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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-877

ABRAM CHEATHEM, JR., HAZEL CHEATHEM,
Petitioners,

v.

THE CITY OF EVANSVILLE, INDIANA, Acting by the Evansville, Indiana Redevelopment Commission,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Indiana

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December 12, 1972

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No. .....

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THE CITY OF EVANSVILLE, INDIANA, Acting by the Evansville, Indiana Redevelopment Commission,
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PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Indiana

The petitioners Abram Cheathem, Jr. and Hazel Cheathem respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Indiana entered in this proceedings on February 18, 1972.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, printed in the Appendix hereto, *infra*, p. A-1 is reported in 278 N.E. 2d 602.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on February 18, 1972. A timely petition for rehearing was denied on March 22, 1972. A timely petition to transfer the cause to the Supreme Court of Indiana was denied on October 4, 1972. The Supreme Court of Indiana is the highest court in that state, having jurisdiction to review decisions of lower state courts. Indiana Rules of Appellate Procedure, AP 11 (B). This petition for certiorari was filed within 90 days of the Indiana Supreme Court's refusal to review, or "transfer", the decision herein. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a municipal corporation can discriminate against certain of its citizens in the payment of moving and relocation expenses, after it has taken their real estate for slum clearance.

2. Whether the violation of one's Federal Constitutional rights gives rise to a cause of action for damages.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, 14th Amendment, § 1, provides in its relevant parts:

> "* * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts in the case are established by Cheathems' amended complaint, filed in the Vanderburgh Circuit Court of Vanderburgh County, Indiana. This amended

complaint first raised the Federal Constitutional question, and its relevant portions read as follows:

"3. That the plaintiffs are citizens of the United States of America, the State of Indiana, and the City of Evansville, Indiana, and are taxpayers of each of said governmental units, but because of their lack of education, their environment, having lived in a slum area, their race, which is of the Negro or black race, and their lack of legal advice and counsel early in the proceedings mentioned hereinbelow, are disadvantaged persons.

5. That sometime prior to the filing of this action, the exact date being unknown to plaintiffs, but known to defendant City, the defendant City started a redevelopment project in real estate which included that owned by plaintiffs, that said area was known as 'Villa Sites', a slum area, during the course of which defendant City acquired real estate in said area either by purchase or condemnation, with the intention to raze the structures in said area and to resell the same.

6. That the defendant City, in the course of said operation, acquired plaintiffs' real estate.

7. That said defendant City, by the use of some formula, or regulations the exact nature which are also unknown to plaintiffs, paid to residents in said redevelopment area relocation and moving expenses, but did not pay said relocation and moving expenses to plaintiffs. That plaintiffs have therefore suffered discrimination from said defendant City and pray for an amount which their neighbors in comparable situations have received, the exact amount being unknown to plaintiffs. That if said regulations, or formula, referred to hereinabove, do not provide that plaintiffs receive relocation and moving expenses, then the same are unconstitutional as a denial of equal protection of

laws guaranteed to these plaintiffs by the 14th Amendment to the Constitution of the United States.

8. That the discrimination against plaintiffs as set out hereinabove is the taking of their property without just compensation in violation of both the State and Federal Constitution."

The City filed a motion to dismiss under Rule TR. 12(B) of the Indiana Rules of Civil Procedure (virtually identical to the Federal Rule) averring: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the City's "person"; and (3) failure to state a claim upon which relief could be granted.

The trial court sustained the City's motion to dismiss, assigning these reasons for its ruling:

(1) Recovery by Cheathems is prohibited by 42 U.S.C. 1465(e) which prohibits review by any Court of a determination by a federal agency as to the right to receive relocation assistance.

(2) There was no taking of Cheathems' property.

(3) Cheathems' amended complaint does not show any valid claim of racial discrimination.

Cheathems refused to plead over and judgment was rendered against them. They filed a motion to correct errors (Indiana prerequisite to appeal, Indiana Rules of Trial Procedure, TR. 59[G]) which again raised Federal Constitutional questions:

"5. That plaintiffs' amended complaint alleges a claim upon which relief can be granted against said defendant City, in that it alleges discrimination against plaintiffs in violation of the equal protection clause of § 1 of the 14th Amendment to the Constitution of the United States,

• • •

"6. That plaintiffs' amended complaint alleges a claim upon which relief can be granted against said defendant City * * * in that it alleges a deprivation of property without due process of law in violation of § 1, 14th Amendment to the Constitution of the United States."

The motion to correct errors was denied by the trial Court and the appeal was filed in the Indiana Court of Appeals. Subsequent to the docketing of Cheathems' appeal and the filing of their briefs, the Supreme Court of the United States announced an important new decision. When the Cheathems suffered an adverse decision in the Court of Appeals, they petitioned the Supreme Court of Indiana to transfer the cause there, citing this new decision in their petition to transfer:

"(c) That the opinion of the Court of Appeals erroneously decides a new question of law, to-wit: Whether or not one is entitled to damages for violation of Constitutional rights. This is a new question in Indiana, to the best of appellants' knowledge, never having been previously decided by the Court of Appeals or the Supreme Court of Indiana. The decision and opinion of the Court of Appeals decides this question adversely to appellants, who most respectfully assert that said decision of the Court of Appeals is erroneous. Appellants contend that the correct view, that is, that one is entitled to damages for violation of a Constitutional right (in this case a denial of equal protection of the laws), has been enunciated in the case of **Bivens v. Six Unknown Agents, et cetera** (1971) 403 U.S. 388, 91 S.Ct. 1999, ... L.ed 2d ...."

This petition to transfer was denied on October 4, 1972 and thus, this petition for a writ of certiorari is brought.

(N.B.: Two issues are **not** here involved. First, in the trial court the United States of America, acting by the

Department of Housing and Urban Development, had been made a party only "to comply with the demand made in the defendant City's motion to dismiss." After its motion to dismiss was granted no relief nor review was sought as to the United States, nor is any sought now.

Second, the Indiana Court of Appeals held that the "first reason stated by the trial court is not sufficient to grant a 'Motion to Dismiss'." 278 N.E.2d 602, 606. That reason was based upon statutory prohibition of review of a determination of the right to relocation assistance. 278 N.E.2d 602, 604. Thus, that question is not before this Court).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions of This Court as to What Construction Should Be Given to the Equal Protection Clause

The petitioners' complaint below alleged: That petitioners were poorly educated, black, slum-dwellers; that the City, in a slum clearance project, acquired the real estate therein, including petitioners'; and that the City paid moving and relocation expenses to the other residents of that area, **but did not pay these expenses to petitioners.** The Indiana Court of Appeals held that the complaint did not state a claim upon which relief could be granted.

How is a complaint construed, under Indiana law, when tested by a motion to dismiss for failure to state a claim upon which relief can be granted?

The case of **Gladis v. Melloh** (1971), ... Ind. App. ..., 273 N.E.2d 767, 769, holds:

> "In addition the Supreme Court of the United States has stated that a 'complaint should not be dis-

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Where the complaint shows the plaintiff may be entitled to some relief, the complaint is not to be dismissed even though he is not entitled to the particular relief for which he has asked in his demand for judgment. Lada v. Wilkie, 250 F.2d 211 (8th Cir. 1957).

The test is whether in the light most favorable to the plaintiff and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claims. Knox v. First Sec. Bank of Utah, 196 F.2d 112 (10th Cir. 1952).

Since Trial Rule 12 of the Indiana Rules of Civil Procedure is quite similar to its counterpart of the Federal Rules of Civil Porcedure, the above Federal authorities are relevant to a proper interpretation of the Indiana Rules."

With that kind of background authority on the construction of complaints, we consider the Equal Protection aspect of the problem. The facts, considered in that frame of reference, are pure and simple. Petitioners' neighbors all got relocation and moving expenses, but they did not. They are poor blacks. Below it was argued by the City that, at the time in question, victims of eminent domain proceedings were not entitled to such expenses. However, in Indiana, "It is a well established principle that public officers are presumed to perform their official duties and that their official acts, in the absence of evidence to the contrary, are presumed to be regular." **Steele v. Fowler** (1941), 111 Ind. App. 364, 376, 41 N.E.2d 678.

Thus, we must presume that when the City's officers and agents paid petitioners' neighbors, they were correctly performing their duties and not bestowing gifts upon residents of the City (Even if they were bestowing gifts, it would appear that the Equal Protection Clause would require non-discriminatory bestowal).

The City's argument below, adopted by the Indiana Court of Appeals, was that since the petitioners did not plead with a grammar school tediousness, no discrimination had been satisfactorily alleged. This argument flies into the face of Indiana law on construction of complaints challenged by a motion to dismiss, as petitioners have demonstrated above. If we accept the proposition that discrimination on account of race has been pleaded, then a clear violation of the Equal Protection Clause has been alleged, as this Court has repeatedly held that such discrimination is violative of this clause. **Cooper v. Aaron** (1958), 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5.

Assuming, *arguendo*, that discrimination on the basis of race has not been alleged, there is still an allegation of denial of equal protection. Everyone else in petitioners' condition has been treated in a certain manner, petitioners, for no reason, have not been so treated. **Reynolds v. Sims** (1964), 377 U.S. 533, 566, 84 S.Ct. 1362, 1383, 12 L.Ed.2d 506, rehearing den. 379 U.S. 870, 85 S.Ct. 12, 13 L.Ed.2d 76, holds:

> "• • • the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to government action questioned or challenged. • • •"

2. **The Decision Below Directly Conflicts With a Decision of This Court Upon the Right to Damages for Violation of Constitutional Rights.**

When this case was being litigated in the trial and appellate courts of Indiana, this Court decided the case of **Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics** (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619. That case held that one is entitled to damages for violation of Federal Constitutional rights. The case at bar is in direct contradiction to that. The possibility of fifty different views of this question exists. This Court's view must remain paramount.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Indiana Court of Appeals.

Respectfully submitted

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December 12, 1972.

OPINION AND JUDGMENT OF THE INDIANA COURT OF APPEALS

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In the
Court of Appeals of Indiana
Third District

Abram Cheathem, Jr., Hazel Cheathem, Appellants (Plaintiffs below),

v.

The City of Evansville, Indiana, Acting by the Evansville, Indiana Redevelopment Commission, the United States of America, Acting by the Department of Housing and Urban Development, Appellees (Defendants below). } No. 271 A 24.

Appeal from the Vanderburgh Circuit Court
Honorable William H. Miller, Judge

Staton, J.

This is an appeal from a "Motion to Dismiss." Appellants, Abram Cheathem, Jr. and Hazel Cheathem, whose

real property was located at 2417 Haag Avenue in an Evansville redevelopment project, filed an "Amended Complaint" for relocation and moving expenses equal to that received by other residents. Appellee, City of Evansville, filed its "Motion to Dismiss" which was granted by the Vanderburgh Circuit Court.

The appellants hereafter will be referred to as "Cheathem" and the appellees will hereafter be referred to as the "City."

Cheathem suggests in his brief that rhetorical paragraphs "3" and "7" present the "* * * facts most pertinent to this appeal, * * *." We have taken the liberty of setting forth rhetorical paragraphs "5" and "6" of the Cheathem "Amended Complaint" which we hope will add to the continuity of the claim:

> "3. That the plaintiffs are citizens of the United States of America, the State of Indiana, and the City of Evansville, Indiana, and are taxpayers of each of said governmental units, but because of their lack of education, their environment, having lived in a slum area, their race, which is of the Negro or black race, and their lack of legal advice and counsel early in the proceedings mentioned hereinbelow, are disadvantaged persons.
>
> 5. That some time prior to the filing of this action, the exact date being unknown to plaintiffs, but known to defendant City, the defendant City started a redevelopment project in real estate which included that owned by plaintiffs, that said area was known as 'Villa Sites,' a slum area, during the course of which defendant City acquired real estate in said area either by purchase or condemnation, with the intention to raze the structures in said area and to resell the same.

6. That the defendant City, in the course of said operation, acquired plaintiffs' real estate.

7. That said defendant City, by the use of some formula, or regulations the exact nature which are also unknown to plaintiffs, paid to residents in said redevelopment area relocation and moving expenses, but did not pay said relocation and moving expenses to plaintiffs. That plaintiffs have, therefore, suffered discrimination from said defendant City and pray for an amount which their neighbors in comparable situations received. That if said regulations, or formula, referred to hereinabove, do not provide that plaintiffs receive relocation and moving expenses, then the same are unconstitutional as a denial of equal protection of laws guaranteed to these plaintiffs by the 14th Amendment to the Constitution of the United States."

The reasons given by the court for granting the City's Motion to Dismiss the "Amended Complaint" of Cheathem are, omitting the formal parts, as follows:

"The defendant, City of Evansville, Indiana, filed a Motion to Dismiss which was based on the following grounds:

(a) The Court lacked jurisdiction of the subject matter.

(b) The Court lacked jurisdiction of the person of the City of Evansville, Indiana.

(c) The amended complaint failed to state a claim upon which relief can be granted.

"In the view of the Vanderburg Circuit Court plaintiffs' claim, if any, could exist only under applicable United States Statutes. Recovery by the plaintiffs is prohibited by the express terms of 42 U.S.C. 1465, sub-section (e), which specifically prohibits review

by any Court of a determination made by the federal agency as to the right to receive any relocation assistance. This was the holding in **Merge v. Troussi** (1968), 394 F.2d 79.

"However, even if it were held that the prohibition of review by any court was not binding upon state courts, then the plaintiffs are precluded by failure to state any claim resting upon state statutes or constitutional grounds. The plaintiffs' amended complaint fails to state any cause under Indiana law which would form the basis for a recovery.

"First, there was no taking of any property. The plaintiffs assert in their amended complaint that they failed to receive relocation payments as other persons did. But they do not allege or assert in their amended complaint the taking of any of their property by the exercise of the power of eminent domain. Rhetorical paragraph six of the amended complaint merely says 'That the defendant, City, in the course of said operation, acquired plaintiffs' real estate.' However, even if the real estate of the plaintiffs had been taken by eminent domain there is no requirement by state law to pay relocation expenses. It was not until 1971 that the Indiana General Assembly adopted a statute which required the payment of relocation expenses to persons affected by condemnation other than by condemnation actions instituted by the Indiana State Highway Commission.

"The plaintiffs' amended complaint also does not show any valid claim of racial discrimination. The amended complaint does not even allege racial discrimination. It alleges that other persons were paid but does not say that such payment was a discrimination based upon racial origins. Apart from the allegations that they are disadvantaged persons and that

others were paid relocation and moving expenses, while they were not, there is nothing to show any right to receive relocation or moving expenses. At the best the amended complaint shows that they owned land in the redevelopment area (but make no allegations that they resided therein) and does not show that they suffered or were required to make or incur any relocation or moving expenses."

The trial court granted the City's "Motion to Dismiss." Cheathem refused to plead further. Judgment was entered and Cheathem filed his "Motion to Correct Errors."

Rule TR. 12(B)(6) is the Indiana Rule of Procedure for Granting a Motion to Dismiss. It is identical to the Federal Rule. A Motion to Dismss must be viewed by the trial court "* * * in the light most favorable to the plaintiff, and with every intendment regarded in his favor,* * *" to ascertain whether "* * * the complaint is sufficient to constitute any valid claim."

Theis v. Heuer (1971), ... Ind. App. ..., 270 N.E. 2d 764, 26 Ind. Dec. 3;

Volume 1A, Federal Practice and Procedure;

Barron and Holtzoff (Wright Ed.) § 356.

Under our rule as well as the Federal Rule, Cheathem's failure to be definite and his lack of clarity in expressing his claim will not usually warrant the granting of a motion to dismiss. When we say that no question of fact will be determined upon a motion to dismiss and that the complaint needs only state enough to enable the defendant to form a responsive pleading, we do not mean that the elements necessary to give the defendants notice of the recovery theory can be excluded. The detailed pleading of facts under the old code pleading has been dispensed with but not the disclosure by the claimant of the theory upon which his claim is based. Cheathem has

the burden to state all of the necessary elements of his theory of recovery. It is not the trial court's duty to search for all possible legal theories which may or may not apply to the statements advanced by the plaintiff in his claim when a motion to dismiss has been made. In the present case, Cheathem has refused to plead further and he is bound by what he has chosen to include in his claim.

The court must enter judgment if it appears that the moving party is entitled to judgment as a matter of law.[1] Judgment is never entered because the court may believe that the plaintiff will ultimately be unable to prove the allegations of his complaint. The complaint should not be dismissed so long as there is any possibility that the plaintiff will ultimately prevail. Examining Cheathem's "Amended Complaint," the test is whether in the light most favorable to Cheathem with every intendment regarded in his favor, his "Amended Complaint" is not sufficient to constitute any valid claim.

The "Amended Complaint" poses two propositions of law:

(1) Cheathem is entitled to relocation assistance as a constitutional guarantee against taking of property without just compensation; and, (2) the state agency's rules and regulations are unconstitutional as violative of the Fourteenth Amendment of the Constitution of the United States and the Indiana Constitution. The trial court gave two reasons for granting the "Motion to Dismiss." The first reason goes to Federal legislation and jurisdiction. The second reason goes to the failure to state any cause under Indiana law which would form the basis for recovery.

Addressing itself to the first reason, the trial court stated: "Recovery by the plaintiffs is prohibited by the

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[1] For second and subsequent amendments of pleadings consult Rule TR. 15(A) of the Indiana Rules of Civil Procedure.

express terms of 42 U.S.C. 1465, sub-section (e), which specifically prohibits review by any court of a determination made by the Federal agency as to the right to receive any relocation assistance." **Merge v. Troussi**, 394 F. 2d 79 (1968) was cited as authority.

42 U.S.C. Sec. 1465, Sub-section (e):

> "The Secretary is authorized to establish such rules and regulations as he may deem appropriate in carrying out the provisions of this section and **may provide in any contract with a local public agency or in regulations promulgated by the Secretary, that determinations of any duly designated officer or agency as to eligibility for and the amount of relocation assistance authorized by this section shall be final and conclusive for any purposes and not the subject to redetermination by any court or any other officer, * * *.**" (Emphasis added.)

The prohibition of review by courts applies to determinations made by a "designated officer or agency." Cheathem is not asking in his "Amended Complaint" for a review of such a determination, if in fact any such determination was ever made. The prayer of the "Amended Complaint" is "* * * for an amount equal to that received by other residents in said redevelopment area for their relocation and moving expenses." There is no pretense made by Cheathem to have a determination reviewed by the Vanderburgh Circuit Court. If this were the purpose of his "Amended Complaint" the court's reasoning and application of the Federal statute would be applicable. The first reason stated by the trial court is not sufficient to grant a "Motion to Dismiss."

The second reason given by the court for granting the City's Motion to Dismiss is: "The plaintiffs' 'Amended Complaint' fails to state any cause under Indiana law

which would form the basis for a recovery." The validity of this reason for granting the City's "Motion to Dismiss" rests with the answer to the question: Is the denial of relocation expenses a taking of property without just compensation under Indiana law? Cheathem expresses the question in another manner in his brief: "When the defendant acquired plaintiffs' real estate, it took away their right to the quiet enjoyment of living in a home * * *, it deprived them of property without just compensation." Cheathem cites this as a violation of Article 1, § 21 of the Constitution of the State of Indiana and the 14th Amendment, § 1 of the Constitution of the United States. Cheathem further states in his brief that: "Counsel cannot find any cases, decided under these provisions, with facts similar to the case at bar." We would call Cheathem's attention to **Joslin Mfg. Co. v. Providence** (1923), 262 U. S. 668 at 676, 67 L.Ed. 1167, 43 S. Ct. 684, in which the Court stated:

> "Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute * * *."
> Also, see 69 A.L.R. 2d 1454, § 2.

We would further call to the attention of Cheathem a summary of the holdings of our Supreme Court of the United States on this question which has been set forth in **Housing Authority of City of E. St. Louis v. Kosydor** (1959), 17 Ill. 2d 602, 162 N.E. 2d 357, 360, which is as follows:

> "The United States Supreme Court has recently considered whether removal costs are recoverable under the fifth amendment to the Federal constitution requiring 'just compensation' for private property taken by the Federal government. **United States v. General Motors Corp.**, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311; **United States v. Petty Motor Co.**, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729; **United States v.**

Westinghouse Electric & Mfg. Co., 339 U.S. 261, 70 S. Ct. 644, 94 L. Ed. 816. These decisions indicate that the Federal guarantee of 'just compensation' does not comprehend moving expenses as an element of damage except in the case where private property is taken only temporarily for public use. Absent this exception, a condemnee's right of compensation is limited to the market value of the interest taken. 'Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken.' "

We agree with the trial court that Cheathem has not stated a cause under the 14th Amendment of the Constitution of the United States from which recovery can be had.

Cheathem further argues that the Indiana Constitution also requires that relocation expenses be paid as part of "just compensation." We do not agree. The elements considered in a taking are set forth in IC 1971, 32-11-1-6; Ind. Ann. Stat. § 3-1706 (Burns 1968):

> "First. The fair market value of each parcel of property sought to be appropriated, and the value of each separate estate or interest therein;
>
> Second. The fair market value of all improvements pertaining to the realty, if any, on the portion of the real estate to be condemned;
>
> Third. The damages, if any, to the residue of the land of such owner or owners to be caused by taking out the part sought to be appropriated;
>
> Fourth. Such other damages, if any, as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff."

The first three categories under the statute above concern themselves with real property interests which are

familiar to all eminent domain proceedings. It is the fourth category which would entertain relocation or moving expenses provided that this is the intent. Therefore, we address ourselves to the question: Are moving and relocation expenses a part of just compensation under the fourth category of the statute? Our Supreme Court in **State v. Heslar** (1971), ... Ind. ... [27 Ind. Dec. 377], 274 N. E. 2d 261, 266, in a decision written by Judge Hunter, gives a very narrow and limited application of this statutory category:

> "In fact, it appears from reading the fourth element of damages in the statute, that it was intended to recompense a person for damages resulting from the method of construction in a physical sense. The statute states that it applies to damages which result from the 'construction of the improvements in the manner proposed * * *' It is intended to cover such conditions as a total denial of access due to the method of construction. It was not intended to cover any or all consequential damages of any kind. **State v. Stabb** (1948), 226 Ind. 319, 79 N.E. 2d 392, contained language that any consequential damages were allowable, but that case was found to have no legal significance in **State v. Jordan**, *supra*, 247 Ind. at 366, 215 N.E. 2d 32. That being the case, we here expressly overrule **State v. Stabb** as it relates to damages for loss of profits and to its definition of consequential damages. Our policy should not be such as to place an undue burden upon the State in acquiring land for such public improvements as highway construction when such improvements are considered to be in the public interest. Allowance of such remote and highly speculative items as loss of business or profits would do just that."

Therefore, we are of the opinion that Indiana follows the great weight of authority which denies relocation ex-

penses as a part of "just compensation."[2] (See 69 A.L.R. 2d 1453.)

Rhetorical paragraph "7" of Cheathem's "Amended Complaint" alleges discrimination by the City through the application of "• • • some formula or regulations, the exact nature which are also unknown to plaintiffs, • • •." We have already discussed the question of relocation or moving expenses as an element of taking without just compensation under the Constitution of the State of Indiana and the Constitution of the United States. If the City took Cheathem's property under eminent domain, it would have to follow the Indiana statutes pertaining thereto. Violation of such statutes has not been alleged by Cheathem. No right to relocation or moving expenses existed when Cheathem filed his complaint.[3] In rhetorical paragraph "5" of Cheathem's "Amended Complaint", he suggests an alternative: "[The] City acquired the real estate in said area either by purchase or condemnation • • •." If Cheathem's property was purchased by the City, a violation of the contractual agreement should have been alleged. Cheathem has not made it clear in his claim to the court which method was used by the City in acquiring his property. Furthermore, he has refused to amend further so that the trial court could be advised of the basis on which he is seeking recovery. We agree with the trial court that Cheathems "Amended Complaint" in its present form fails to state a claim upon which recovery can be based.

The judgment of the trial court is hereby affirmed.

Hoffman, C. J. concurs
Sharp, J. concurs

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[2] In 1971, the Indiana General Assembly passed the relocation Assistance Act, IC 1971, 8-13-18.5-1; Ind. Ann. Stat. § 3-1771 (Burns 1971 Cum. Supp.). However, this action was begun in 1969 and must be governed by then existing statutes and theories of recovery advanced by Plaintiff.

[3] Ibid.

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To the Court of Appeals of Indiana

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APPENDIX A

Denial of Petition for Rehearing

In the
Court of Appeals of Indiana
Third District

Abram Cheathem, Jr., Hazel Cheathem,
Appellants (Plaintiffs below),

v.

The City of Evansville, Indiana, Acting by the Evansville, Indiana Redevelopment Commission, the United States of America, Acting by the Department of Housing and Urban Development,
Appellees (Defendants below).

No. 271 A 24.

Appellant's Petition for Rehearing denied this 22nd day of March, 1972.

/s/ GEORGE B. HOFFMAN, JR.
Chief Judge

APPENDIX B

Denial of Petition to Transfer

In the
Supreme Court of Indiana

Abram Cheathem, Jr., Hazel Cheathem,
Appellants (Plaintiffs below),

v.

The City of Evansville, Indiana, Acting by the Evansville, Indiana Redevelopment Commission, the United States of America, Acting by the Department of Housing and Urban Development,
Appellees (Defendants below).

Appellant's "Petition to Transfer" is hereby denied this 4th day of October, 1972.

/s/ N. F. ARTERBURN
Chief Justice

All justices concur.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-877

ABRAM CHEATHEM, JR., HAZEL CHEATHEM,
Petitioners,

v.

THE CITY OF EVANSVILLE, INDIANA, Acting by the Evansville, Indiana Redevelopment Commission,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Indiana

QUESTIONS PRESENTED

The Respondent disagrees with the petitioners' statement of the questions presented. The only question presented is whether or not the petitioners' Amended Complaint stated a claim under Indiana law and procedure.

ARGUMENT

Respondent opposes the Petition for a Writ of Certiorari on the following grounds:

1. The Decision of the Indiana Court of Appeals Was Based on Non-Federal Grounds.

The Court of Appeals in its opinion stated "we agree with the trial court that Cheathems 'Amended Complaint' in its present form fails to state a claim upon which relief can be based." Thus, the holding of the Court was specifically on non-federal grounds as to whether the Cheathems had presented a claim under procedural rules of the Supreme Court of Indiana.

Counsel for petitioners was well aware that the Court of Appeals could decide his case on non-federal grounds. In the Brief of Appellants filed by Petitioners with the Appellate Court of Indiana (now the Indiana Court of Appeals) they stated the following:

> "Plaintiffs are aware that Rule AP 8.3(A)(2) does not require such a statement as this one in an appeal to the Appellate Court. However, they believe an explanation of why they have brought their appeal here may be useful to this Court. This appeal involves several constitutional questions and may appear, at first impression, to be within the jurisdiction of the Supreme Court. **Burns Indiana Statutes**, Sec. 4-214. However, authority exists which dictates that if the merits of a case can be reached without deciding a constitutional question, the courts of Indiana will do so. **Shaw v. Union Trust Co.** (1922), 192 Ind. 410, 136 N.E. 571." (Brief of Appellants, p. 5)

This Court is presented with a case which involves a Petition for a Writ of Certiorari from a judgment of the

Court of Appeals of Indiana where transferred to the Supreme Court of Indiana was denied without opinion (S.A.-2). Where, from an absence of an opinion expressed by the highest Court of Appeal, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case, the Supreme Court will not take jurisdiction. **Cuyahoga River Power Co. v. Northern Realty Co.** (1917), 244 U.S. 300, 37 S.Ct. 643, 61 L.Ed. 1153.

This Court has held in **Ellis v. Dixon** (1955), 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231, that it was without jurisdiction to review a judgment of a state court denying, without stating any ground for a decision, a motion for leave to appeal, where the Supreme Court itself could not decide on the vague and empty record the constitutional issues tendered. By the same token, the state court was entirely justified in refusing to pass on them, and, consequently, its denial of leave to appeal rested on an adequate non-federal ground.

Petitioners had a remedy under state law which they chose not to exercise. They could have amended their complaint. The Court of Appeals said:

> "When we say that no question of fact will be determined upon a motion to dismiss and that the complaint needs only state enough to enable the defendant to form a responsive pleading, we do not mean that the elements necessary to give the defendants notice of the recovery theory can be excluded. The detailed pleading of facts under the old code pleading has been dispensed with but not the disclosure by the claimant of the theory upon which his claim is based. Cheathem has the burden to state all of the necessary elements of his theory of recovery. It is not the trial court's duty to search for all possible legal theories

which may or may not apply to the statements advanced by the plaintiff in his claim when a motion to dismiss has been made. In the present case, Cheathem has refused to plead further and he is bound by what he has chosen to include in his claim." (A-6)

2. **No Constitutional Question Is Presented.**

In their Petition to Transfer to the Indiana Supreme Court the petitioners alleged four grounds or errors in the Court of Appeals' Opinion. Two grounds were that the Court of Appeals' opinion contravened ruling precedents of the Supreme Court of Indiana. Another ground was whether or not one was entitled to moving and relocation expenses. The fourth ground was that the Court of Appeals erroneously decided that the petitioners were not entitled to damages for violation of constitutional rights. This issue was never raised in the trial court or raised in the Court of Appeals. (See petitioners' Brief filed with the Court of Appeals). Even assuming that the issue was properly presented there is no authority to support the contention. The case cited by petitioners is **Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics** (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619. **Bivens** granted a right to bring an action against federal agents for an unconstitutional search. No such issue is presented here.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be denied.

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February 9, 1973